EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

DECEMBER TERM, 1829.

Ailsey Flintham, Thomas Ross, Catherine Kerr & Nancy Kerr, Petitioners
v.
Thomas Holder adm'r. of James Flintham, and the Trustees of the University—Defendants,
} From Orange.

Where there are children of the same mother, some born in wedlock and some illegitimate—the former class may inherit from the latter, and the latter may inherit from each other; but the latter cannot inherit from the former, nor can the mother, in any case, inherit from the latter.

The petition stated that *James Flintham* died intestate without leaving any widow, child or other issue surviving, and possessed of a considerable personal estate, which had come to the hands of the Defendant *Holder*, as his administrator—that the intestate was the illegitimate child of the petitioner *Ailsey*, and that the petitioners *Thomas*, *Catherine* and *Nancy*, were the brother and sisters of the intestate; and the petitioners prayed that the Defendant might account with them for the personal estate of his intestate.

The answer of *Holder* averred his readiness to settle with and pay to the parties really entitled, but alleged that he had been advised by Counsel, that the Trustees

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of the University and not the petitioners, were entitled, and prayed that the question of right might be contested between the claimants, and that he might pay under the direction of the Court.

Upon the coming in of *Holder's* answer, the Trustees were made Defendants, and insisted that they were entitled, averring that the intestate was a bastard, and therefore the petitioner *Bilsey* could not take, and denying any knowledge of the relationship to the intestate claimed by the other petitioners.

Upon the hearing before his honor Judge Norwood, in the Court below, it appeared that the intestate was the illegitimate child of the petitioner *Bilsey*, that he died without wife or issue, and that the other petitioners were the children of the said *Bilsey* and born in lawful wedlock, and thereupon his Honor declared, that the petitioner *Bilsey* was not entitled to any part of the intestate's estate, that the Trustees did not take the same, but that the brother and sisters of the intestate were entitled thereto, as next of kin and sole distributees, and decreed the same to be paid to them accordingly, from which decree the Trustees appealed.

The cause was argued here by *Gaston*, for the Appellants, and *Nash*, who was to have argued in support of the decree, was stopped by the Court.

The act of 1799, *ch.* 522, upon the construction of which the case turned, entitled "an act to make provision for natural born children," is in these words:—

"That where any woman shall die intestate, leaving children, commonly called illegitimate or natural, born out of wedlock, and no children born in lawful wedlock, all such estate whereof she shall die seised or possessed of, whether real or personal, shall descend to and be equally divided among such illegitimate or natural born children, and their representatives, in the same manner as if they had been born in wedlock; and if any such illegitimate or natural born child shall die intestate,

without leaving any child or children, his or her estate, as well real as personal, shall descend to, and be equally divided among his or her brothers and sisters born of the body of the same mother, and their representatives, in the same manner, and under the same regulations and restrictions as if they had been born in lawful wedlock; any law, usage or custom to the contrary notwithstanding."

RUFFIN, Judge.—This case depends upon the just construction of the act of 1799, (*Rev. ch.* 522.) It is contended, for the Appellants, that the decree is erroneous, because the words of the act confine its operation to the single case, where there are bastard children of a mother, leaving no children born in lawful wedlock; or at any rate, that no construction can carry it further, than to let in bastards alone to descents from bastards. Certainly the claim of the University must prevail, unless intercepted by a fair construction from the statute—since at common law, there is no collateral descent to or from a bastard.

It is to be premised however, that even a refinement would be allowable, that led to an heir, and prevented property from being derelict. Our law leans against escheats. Half-blood has been admitted, although there be not a drop of the first purchaser's mingled with it.—Parents inherit from children; widows from husbands; bastards from mothers, and from each other.

Two cases are expressly embraced in the act; the one descents from the mother, the other descents from the bastards themselves. As to the former, there can be no doubt, that the bastard cannot inherit, if the mother leave a legitimate child. The words are, where the mother "leaving no children born in lawful wedlock," her estate shall descend to her illegitimate children. The capacity of the bastard to inherit *from his mother* is, therefore, expressly limited to the single case of the mother's leaving no issue but bastards. We can be at no

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loss for the reason of this provision. The restriction grew out of the same policy, which at common law excluded bastards altogether, namely, an earnest and anxious desire to uphold and encourage the great social compact, marriage. To enforce that policy, our ancestors imposed the rigorous penalty of an escheat, rather than admit a bastard to the succession. Our Legislature has yielded something to natural affection, but not so much as to impair the value to the parties, or the public, of that important relation. Bastards are admitted, when there is no legitimate child; because it is of common interest, that all children should have a competent maintenance of parental provision; and because there seems a natural right in the child to the fruits of the parents labours, unless for better ends they can be bestowed on others, deemed more worthy. It is still an object, not altogether unattainable, to reform the mother, and fit her for the duties of a mother and guardian of her unhappy and degraded offspring. If any thing has that tendency, it is marriage. The more prudent, the greater will be the probability of those happy results. To encourage the marriage, and prudent marriage of the mother, and thereby promote the real good of the illegitimate issue themselves, the statute holds out this inducement to a husband, that *his* children shall succeed to the *whole* of their mother's estate, in exclusion of others.—This part of the act does not directly affect the present question; but it has a materal bearing upon it, since it exhibits a decided preference, founded on the clearest and soundest reasons, which have a strong application to the other parts of the act, and enable us the better to discover its spirit. The words ought to be very positive, which should exclude the legitimate altogether from succeeding to bastard children, when we find the same act admitting them alone, in exclusion of the bastards, to inherit from the mother.

We come now however to consider the act itself, in reference to a descent from a bastard. The provision is, "if any such illegitimate child shall die intestate, without leaving a child, his estate shall descend to, and be equally divided among his brethren and sisters, born of the body of the same mother and their representatives, in the same manner as if they had been born in lawful wedlock." If there be none but bastards, unquestionably they succeed to each other. But if the intestate have two sets of brethren, one legitimate and the other illegitimate, then, it is contended, neither succeeds, or the bastards only; and if he leave legitimate brethren only, that they are excluded.

The point is not entirely new. It was decided in a case where there were two lines, by the late Supreme Court. (*Arrington* v. *Alston*, *N. C. Term Rep.* 310.)—The descent was held to be to both equally. But as the question was not much debated there, the Court is willing to reconsider it.

The general scope of the act is, to prevent an escheat in a case where it existed before, namely, upon the death of a bastard intestate, and without lineal heirs; and to provide for bastard brethren. But it is argued, that the descent between illegitimate brothers and sisters themselves is tied up to the case, where there are none but illegitimates. This is founded upon the words "any such," as referring to the illegitimate children spoken of in the previous sentence, that is to say, bastards of a mother, leaving no legitimate child. It must be admitted, that the clause is badly penned. But it may be construed without giving the restrictive and particular meaning to those words or relatives, which shall confine them to the happening of the whole case, provided for in the previous clause. "Such" need not be referred at all *to the mother*. The act does not mean, the bastard children of "*such*" *mother*, that is, one leaving illegitimate and no legitimate children—but only "such" or "any"

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illegitimate person. It is the same as if the sentence had been written, "if *any* illegitimate child shall die," &c. It is but common respect to the Legislature to put such a construction upon the act. Upon what conceivable reason, shall the existence of a brother born in wedlock defeat the descent from a bastard to another bastard brother? A motive of policy might, indeed, have induced the Legislature to make the legitimate sole heir to the intestate bastard. But they have not thought proper so to order, and it is to be remembered, that this objection cuts off both the lines, upon the ground that the existence of two lines is a *casus omissus* in the act, and remains as at common law. I cannot think so. If there be none but bastards, the act expressly makes them inherit to each other. Shall that succession be defeated by any other means than a preferable heir? Why should it? Good sense says, that the right of a bastard to inherit from a bastard brother shall not be destroyed by the existence of a legitimate brother, *unless the latter can himself inherit.* If the latter cannot inherit, it is the same as if he were not in being. This was the ground taken by the Court, in construing the sixth canon of descents in *Bell* v. *Doxier.* (*Ante* 1 *vol.* 333.) In that case it was held, that the mother had an estate for life in land, derived by her son by descent from his father, though the son left a brother, who, being of the maternal half blood, could not inherit, because there were also paternal uncles and aunts. The mother inherits against the words of the canon, because the intention was to postpone her, *only in favor* of brothers and sisters; and if they cannot take, she shall.

If then bastard brothers may inherit to each other, notwithstanding the existence of legitimate brothers, may not the legitimate brothers in such case succeed as coheirs? The opinion of the Court is, that they do. It seems to follow necessarily from the act, if the positions already taken be true. For if the act in its true mean-

ing is not confined to the case where there are none but bastards, and illegitimates may be heirs to each other, though there be legitimates, the latter must be also heirs. Wherever one can inherit, the other must. The words are, "be divided among his brothers and sisters *born of the body of the same mother.*" It is true, the object of the Legislature is disclosed in the title to be, to provide for bastard children. But that will not restrain the enacting words. They are broad enough to cover all the brethren of both kinds; and there is nothing in the context or reason to limit their sense. It is manifest, that the moral and political considerations which exclude bastards from the succession to the mother, when there is legitimate issue, have no force to exclude the legitimate from the succession to a bastard brother. They powerfully apply indeed, when a bastard shall claim to succeed to a legitimate brother. Accordingly, we find nothing of that sort in the act. There is no provision for a descent from a legitimate to a bastard. The descent from bastards alone is within the purview. Hence bastards can never inherit but from the mother and from each other. But the reasons, on which the legitimates are constituted sole heirs of the mother, alike require, that they should be co-heirs of the bastards. If the Legislature had not thought so, but had intended to confine the descent from bastards to bastards alone, how easy would it have been to say, the estate descend "to all his *illegitimate* brothers and sisters, born of the body of the same mother." Instead of that, they say it shall descend to all his maternal brothers and sisters.

It follows, that the brethren born in wedlock succeed to a bastard brother in like manner, when that line exists by itself, and there is no surviving bastard brother or sister.

The act is limited to descents between the brethren. It does not let the parents in at all. The decree was consequently right in excluding the mother.

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The decree is therefore affirmed, with costs in this Court to be paid by the Appellants. And as the whole case is not here, because the University alone appealed, this decree must be certified to the Superior Court of Orange, with instructions to proceed in the execution of the decree of that Court, as between the other parties.

PER CURIAM.—Let the decree be affirmed.

Frederick H. Collier
v.
Lucretia W. Collier, } From Orange.

For adultery, the Court *may* divorce *a vinculo matrimonii*, but is not bound to do so. It will in its discretion, either dissolve the marriage, or decree a separation of the parties.

Where a husband admits his wife to conjugal embraces with knowledge that she hath committed adultery, he may notwithstanding seek a divorce for her subsequent misconduct.

Petition for Divorce. The Petitioner stated that he intermarried with the Defendant in the year 1824, and that about a year afterwards, she yielded to illicit solicitations, and had adulterous intercourse with several persons—that the Petitioner unwilling to abandon his wife, had removed from the village in which they first resided into the country, and had used every affectionate method to reclaim her, but the petition charged that she continued her former habits, and was then living in adultery.

The cause was heard below at September Term, 1829, before his honor Judge NORWOOD, when the Jury found that the Defendant had committed adultery since her intermarriage with the Petitioner, had borne a child the fruit of her crime, and was still living in adultery.

Upon this finding, the Petitioner's Counsel moved for a divorce from the bonds of matrimony, which the Judge

refused, and pronounced a decree of separation from bed and board, upon which the Petitioner appealed. Dec. 1829. Collier v. Collier.

In this Court, *Winston* for the Petitioner, strongly insisted, that upon the facts found by the Jury, the kind of divorce was not a matter of discretion with the Judge, but he was bound to dissolve the marriage. Of the argument no note is in the Reporter's possession.

HALL, Judge.—Before the act of 1814, (*Rev. ch.* 869) applications for divorce could only be made to the Legislature; and it was competent for them to divorce either from bed and board, or from the bonds of matrimony, at their discretion, without regard to the law as it then stood. But if jurisdiction had been transferred to the Courts on subjects of divorce, they must have decided according to the existing law.

But the Legislature transferred full jurisdiction to the Courts in that year, in each case of impotency, or living in adultery, to divorce either from bed and board, or from the bonds of matrimony, *at their discretion.* As the law stood, all cases of living in adultery were treated in the same way; but no doubt the Legislature considered that extraordinary cases of this kind might occur, attended with such circumstances, that sentence of separation from the bonds of matrimony would be both just and proper. The present case seems not to be one of that description, particularly when the circumstance is adverted to, that the Petitioner took the Defendant back again after her first transgression. Indeed this circumstance has been the ground of some doubt, whether the prayer of the petition ought to be granted, but it has been overcome by considering that the third section of the act, which declares that "in case the husband has admitted the wife into conjugal society, &c. after he knew of the criminal fact, it shall be a perpetual bar," to mean that it shall be a bar to a divorce for that criminal fact, but not to one of a similar kind of which she may afterwards be guilty.

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From the facts set forth in the record sent here, I see no reason why the judgment given in the Superior Court should be disturbed.

Per Curiam.—Let the Decree be affirmed.

James N. Smith
v.
David Dudley,
} From Jones.

Upon the opening of this cause, it appeared by a copy of the order of the Court of Pleas and Quarter Sessions for the County of Jones, that pending this suit, the Plaintiff has been appointed the guardian of the Defendant.

Per Curiam.—Much danger may arise from allowing such a practice. It is therefore ordered, that unless the Plaintiff shall, at or before the calling of the cause at the next term, show that he has resigned the said office, the bill shall be dismissed with costs.

Richard Arendell, et al.
v.
Daniel Blackwell, et al.
} From Rutherford.

Upon the opening of this cause it appeared to the Court, that all the residuary legatees are not parties to the suit.

Per Curiam.—If the Plaintiff pressed the cause for a final hearing, the bill would necessarily be dismissed for want of proper parties. But it is the settled course of Equity practice, not to dismiss in the first instance for that cause, but to allow an amendment for the purpose of making proper parties; and as the Plaintiff elects that mode, such amendment may now be made. It cannot however be done in this Court. The cause must therefore be remanded, with permission to make parties. The Plaintiff to pay the costs of this Court.

MEMORANDA.

At the last Session of the General Assembly, THOMAS RUFFIN, Esq. of Raleigh, was elected a Judge of this Court to supply the vacancy occasioned by the death of JOHN LOUIS TAYLOR, Esq. late Chief-Justice.

At the same Session WILLIAM J. ALEXANDER, Esq. of Charlotte, was elected Solicitor of the Sixth Circuit vice JOSEPH WILSON, Esq. who died during the recess.